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The case of Kijek v. Goldman, recently decided by the Court of Appeals of New York, is a real novelty in the law. No precedent for its conclusion appears to have been found, and the decision therefore was the result of logical deduction from well settled principles. The point decided was that one who has been induced to enter into a marriage contract by the misrepresentations of another that the woman was virtuous and respectable, when in fact she was pregnant at the time by the party inducing the marriage, may maintain an action against him for the damages thereby sustained, and that in such a case exemplary damages may be awarded. While no precedent was found for such an action, it does not follow that there is no remedy for the wrong, because every form of action when brought for the first time must have been without a precedent to support it. Courts sometimes of necessity abandon their search for precedents, and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there is no direct precedent for it because there has never been an occasion to make one. For instance, the action for enticing away a man's wife, now well established, was at first earnestly resisted upon the ground that no such action had ever been brought.

The question in such case as Kijek v. Goldman is not whether there is any precedent for the action, but whether the defendant inflicted such a wrong upon the plaintiff as resulted in lawful damages. As the court says, the defendant by deceit induced the plaintiff to enter into a marriage contract whereby he assumed certain obligations and became entitled to certain rights. His obligation was to support and maintain her, and the right acquired by him was the right to her services, companionship and society. By the fraudulent conduct of defendant he was not only compelled to support a woman whom he would not otherwise have married, but was also deprived of her services while she was in child bed. He thus sustained actual damages to some extent, and as the wrong involved not only malice but moral turpitude also, in accordance with the analogies of the law upon the subject, the jury had the right to make the damages exemplary. By thus applying well settled principles upon which somewhat similar actions are founded, this action can be sustained, because there was a wrongful act in the fraud, that was followed by lawful damages in the loss of money and services. The fact that the corruption of the plaintiff's wife was before he married her does not affect the right of action, as the wrong done to him was not by her defilement, but by the representation of the defendant that she was pure when he knew that she was impure, in order to bring about the marriage. It is difficult to see why a fraud, which, if practiced with reference to a contract relating to property merely, would support an action, should not be given the same effect when it involves a contract affecting not only property rights, but also the most sacred relation of life.

Though the right of action was thus considered as resting upon some pecuniary and tangible loss, the court went further and held that the action can be maintained upon the broader ground of loss of *consortium* or the right of the husband to the conjugal fellowship and society of his wife. The loss of *consortium* through the misconduct of a third person has long been held an actionable injury without proof of any pecuniary loss. "The damages," says the court, "are caused by the wrongful deprivation of that to which the husband or wife is entitled by virtue of the marriage contract. They rest upon the loss of a right which the marriage relation gives and of which it is an essential feature. Whether that right is wrongfully taken away after it is acquired, or the person entitled to it is wrongfully prevented from acquiring it, does not change the effect or lessen the injury. While the plaintiff has not been actually deprived of the society of his wife, he has been deprived of that which made her society of any value, the same as if she had been seduced after marriage. Although the formal right to *consortium* may remain, the substance has been taken away. In other words, when he entered into the marriage relation he was entitled to the company of a virtuous woman, yet through the fraud of the

defendant that right never came to him. He has never enjoyed the chief benefit springing from the contract of marriage, which is the comfort, founded upon affection and respect, derived from conjugal society. If the defendant had deprived the plaintiff of his right to *consortium* after marriage, the law would have afforded a remedy by the award of damages. Yet, the plaintiff, through the fault of the defendant, has suffered a loss of the same nature and to the same extent, except that instead of losing what he once had, he has been prevented from getting it when he was entitled to it. This is a difference in form only and is without substantial foundation. The injury, although effected by fraud before marriage instead of by seduction after marriage, was the same, and why should not the remedy be the same?"

NOTES OF RECENT DECISIONS.

DEVISE—FIXTURES—TAPESTRY ON WALLS.—A recent English case, Norton v. Dashwood, 2 Chan. 497, holds that tapestry which had been cut and pieced so as to cover the walls of a room and the space left by the doors and mantelpiece, and was hung by being nailed to wooden buttons let into the plaster and nailed to the brickwork, passed as a fixture under a devise of the mansion house. This decision was based upon D'Eyncourt v. Gregory, 3 L. R. Eq. 382 (1866), where a testator, who was tenant for life of settled estates, on which he had erected, fitted up, and furnished a mansion house (an old one having fallen into decay), bequeathed all the tapestry, marbles, statues, pictures with their frames and glasses, which should be in or about the house at the time of his death, and of which he had power to dispose, to be enjoyed as heir-looms by the person who, under the limitations in his will, would be entitled to his own estates thereby devised in strict settlement, being the same as those entitled to the settled estates, subject to a condition, with a shifting clause in case the condition was not fulfilled. After the testator's death, A became tenant for life of both the settled and devised estates, and on his death the settled estates devolved on B; but, as the condition was not fulfilled, C became entitled to the devised estate, and to the heir-looms under the shifting clause in the testator's will. The question arose, as between B and C, which of the articles passed under the will; and it was held, that tapestry, pictures in frames, frames filled with satin, and attached to the walls, and also statues, figures, vases and stone garden seats, purchased and set in place by the testator, which were essentially part of the house, or of the architectural design of the building or grounds, however fastened, were fixtures, and could not be removed; but that glasses and pictures not in panels, not being part of the building, and articles purchased by the testator, but fixed in place by A after his death, were not fixtures, and passed to C, under the will.

PROCESS—SUMMONS — ERROR IN NAME.—One of the points decided by the Supreme Court of Minnesota in Bradley v. Sandilands, 68 N. W. Rep. 321, is that a judgment by default against the defendants in an action is valid, notwithstanding a mistake in the summons in the Christian name of one of the plaintiffs. The court says:

It is unquestioned that the Elys made the note upon which the action was brought; that there was no fraud, mistake, or want of consideration in the making of the note; and that it had never been paid. It clearly appears that Arthur Farrar and Samuel H. Wheeler actually owned the note at the time when the complaint was filed, and that, as such owners, they were the real parties plaintiff in the action. And it also clearly appears that the summons was personally served upon both of the defendants Ely. Neither of them appeared in the action, nor in any manner suggested that there was a misnomer in the summons or complaint, or in any proceedings on the part of the plaintiffs. It is expressly found by the trial court that there was such a person as Arthur Farrar, and that he and Samuel H. Wheeler purchased the note of Oscar Farrar prior to the commencement of this action. There is no dispute as to the name of the other plaintiff being given truly, viz: Samuel H. Wheeler. The Elys permitted the judgment to be taken against them more than 25 years ago, and the defendant holds title derived from the purchaser at the execution sale, having purchased in good faith, for a valuable consideration. Upon all these facts appearing, can it be said that the judgment was a nullity? We cannot so regard it. The cases where there is a defect in the name of the defendant in the summons or notice have but little, if any, application to the one at bar. The proper parties defendant having been designated in the summons and complaint, and the complaint correctly entitled in the name of the real parties in interest, the misnomer in the summons, of the Christian name of one of the plaintiffs, while the others were given correctly, and all parties were the identical and real parties in interest, would not render a judgment entered in such proceeding, in the true name of all the parties to the action, a nullity. A summons and

complaint such as appear in this case offered the defendants an opportunity to appear and make a defense before judgment: and, if they declined to do so, a judgment in favor of the plaintiffs necessarily established their right to the relief given, as against the defendants who were actually served. Such a judgment would bar Arthur Farrar and Samuel H. Wheeler, as the real parties in interest, from recovering another judgment upon the cause of action stated in this complaint, although the summons was entitled "Oscar Farrar and Samuel N. Wheeler, plaintiff." Freem. Judgm. § 175; McGaughey v. Woods, 106 Ind. 380, 7 N. E. Rep. 7. The plaintiffs would be bound by such a judgment, because they, as the identical and real persons in interest, voluntarily prosecuted such a proceeding to a final judgment; and the defendants would be bound thereby, because they suffered the judgment to go against them upon notice of such demand, and who was claiming the real interest therein. It seems like trifling with judicial proceedings to remain silent for so many years, with such knowledge, and then seek, upon such a flimsy pretext, to nullify a meritorious judgment thus rendered. Van Fleet, in his work upon Collateral Attack (section 367), says: "In respect to the name of the plaintiff, it does not seem to me that any mistake in that renders the judgment void. If the creditor's real name is John Smith, and he bring suit in the name of George Jones, the defendant has the opportunity to contest and correct that matter, if he cares to do so. And if the person who sues is a stranger, to whom he owes nothing, he has an opportunity to show those facts." Certainly the misnomer of the Christian name of one of the plaintiffs did not affect or change the cause of action against the defendants, and a correction of this name would have left the same cause of action, and the real parties in interest as plaintiffs. The whole record shows that the writing of the word "Oscar" for "Arthur" was a mere clerical error or misnomer, which, upon application to the court, would have been amended; and the omission to do so did not affect the jurisdiction of the court to render judgment binding upon the defendants. See McGaughey v. Woods, 106 Ind. 380, 7 N. E. Rep. 7; Cain v. Rockwell, 132 Mass. 193. We do not attach any importance to the fact that the name of one of the plaintiffs in the title of the action in the judgment attached to the judgment roll was originally written "Oscar Farrar," and that the same was at some time changed to "Arthur Farrar." It does not appear when, or who made the change. It might have been changed before the judgment roll was finally completed, and, in the absence of any evidence upon the question, such would doubtless be the presumption; and thus the judgment would be valid on its face, under the view we take of the law.

INSURANCE — SUBROGATION CLAUSE — CHANGE OF TITLE.—In Dodge v. Bremen Fire Ins. Co., 46 Pac. Rep. 25, decided by the Court of Appeals of Kansas, it was held when a loss of insured property occurs according to the terms of the policy, and the insurance policy has attached to it a subrogation contract which stipulates that the loss, if any, is payable to a mortgagee, or his assigns, as his interest may appear, the owner of the mortgage is the insured, to the extent of his interest, and a change of title which increases his interest in the insured property even to absolute ownership, will not release the insurance company from its liability to pay the loss, and that a change in the title of insured property, which increases the interest of the insured from a lienholder to absolute ownership, is not such a change of ownership as requires notice to be given to the insurance company, under the terms of a subrogation contract which stipulates that the mortgagee shall notify the insurance company of any change of ownership. The following is from the opinion of the court:

The real question in this case is, should the plaintiff recover, upon the agreed statement of facts and the pleadings? In Insurance Co. v. Coverdale, 48 Kan. 446, 29 Pac. Rep. 682, it was decided that the mortgagor could not maintain an action upon a policy of insurance which contained a similar subrogation contract, unless the mortgage was paid, but that the mortgagee only could maintain the action, unless he authorized the owner so to do. By the subrogation contract, the insurance company entered into a contract with the mortgage company, or its assigns, by the terms of which the amount of the policy, in case of loss, is to be paid to it, so far as its interest shall appear. It therefore follows that, so far as his interest appears, John L. Dodge is the assured. The subrogation contract must be construed the same as though it read, "Loss, if any, under this policy, payable to John L. Dodge, mortgagee, as his interest may appear." The policy is to run five years, and the premium for the full time has been paid. No one can collect the money, in case of loss, but Dodge. The insurance company takes the risk, and collects the full premium, knowing that, while Mrs. Cowley holds the fee title, Dodge holds a lien upon the property, which may in time be transferred into a title. It must have anticipated that Dodge was likely to take steps to foreclose the lien which was insured. When an insurance company insures a mortgage lien, it must anticipate that upon default the lienholder will begin foreclosure proceedings, obtain judgment and secure a sale of the mortgaged property. There can be no question but that the mortgagee is protected by the terms of the contract with the insurance company until the sale is confirmed, and the money ordered by the court to be paid to the mortgagee. Is the purchaser also protected by the terms of the contract, and does it make any difference whether the mortgagee or a stranger is the purchaser? If a stranger is the purchaser, there is a change of ownership. If the mortgagee is the purchaser, his interest is changed from a lienholder to an owner in fee. Counsel for defendant in error contends that the interest of John L. Dodge, mortgagee, was insured, and not the interest of John L. Dodge, owner, and that, in order to have held the insurance in force, Dodge should have notified the company of the change of the fee title, and obtained the consent of the company to the change. They argue that the company might have been willing to have insured the property if Mrs. Cowley was the owner, but not if Dodge was the owner. The property was occupied by a tenant as a dwelling when it was insured, and when it burned. It cannot be said that the hazard was increased by the

transfer of the interest of Dodge from a lienholder to a judgment creditor, and then to an owner in fee, The insurance company was willing to insure Dodge, as the assignee of the mortgagee. The contention of counsel for the insurance company is that Dodge failed to notify the company of the change of ownership which occurred when he purchased the property at sheriff's sale, and have the permission of the insurance company for the change of ownership indorsed upon the policy. We cannot think that this is such a change of ownership as is contemplated by that clause of the subrogation contract. The change of ownership in this case increased the interest of Dodge, who, under the subrogation contract, is the insured. In no way was the risk increased. The title had not vested in some one other than the insured. It cannot be said that the insurance company might not be willing to insure the property with Dodge as the owner, because Dodge was already the insured. No one else could have maintained an action for the recovery of the insurance money. "A change of title which increases the interest of the insured, whether the same be by sale under judicial decree, or by voluntary conveyance, will not defeat the insurance." Insurance Co. v. Ward, 50 Kan. 349, 31 Pac. Rep. 1080, and cases there cited. If the property had been sold to some one other than the insured, and the insured had knowledge thereof, there would be a reason why such knowledge should have been imparted to the insurance company, so that they could have elected whether they would have carried the insurance with such a person as owner. In this case there was at no time a change of the person insured. It was always the loan company and its assignees. The only change of title or ownership was to increase the interest of the insured in the property, and make his interest the absolute ownership thereof. Surely the insurance company cannot complain of this; nor is it entitled to any notice of such a change, under the terms of the subrogation contract.

CRIMINAL LAW—HOMICIDE—MALICE—PRESUMPTION.—In Territory v. Lucera, 46 Pac. Rep. 18, the Supreme Court of New Mexico decides that it is error on a trial for murder, to instruct that malice is implied from the fact of killing, especially where the killing is admitted, and the evidence for defendant tends to show that it was done under circumstances of considerable provocation, after deceased had attempted to secure his freedom by slaying his guards. The court says on this point:

A much more serious class of errors was committed in relation to instructions 14, 19, and 24 given at the request of the prosecution, which are as follows: "Fourteenth. In this case there is no presumption in favor of the defendants, Juan B. Romero or Sostenes Lucera, or either of them, but they are to be judged in the same manner as if they were not officers of the law, and had done the killing in question, which is admitted, without being armed with a writ or warrant; and after the killing has been established, which is not denied in this case, it devolves upon the defendants to establish that the killing done by them was either excusable or justifiable, and that there was no malice, express or implied, in so killing." "Nineteenth. If the jury believe that the defendants, or either one of them, without the other objecting or protesting, and standing by shot and killed the deceased under such circumstances, then they would be guilty of murder in the first degree, unless they established the fact that they were excusable or justifiable by evidence to the satisfaction of the jury." "Twenty-fourth. The court instructs the jury that, while it is incumbent upon the prosecution to prove every material allegation of the indictment as therein charged, it is not required that the same shall be proved in every case literally as charged, such, for instance, as the date, which may be changed—which is not required to be proven of the date shown in the indictment; that, if the material allegations of the indictment are substantially proven as charged therein, the same will be sufficient; that nothing is to be presumed or taken by implication against the defendants, or either of them, until the fact of the killing has been established beyond a reasonable doubt; that then the killing is presumed to be malicious, and it devolves upon the defendants to establish to the contrary."

Is it true that the law implies malice from the fact of killing, upon the trial on an indictment for murder? It is true that a jury would not be at liberty to rest their verdict of guilt upon the fact of the killing by the defendant. But this conclusion of fact is quite different from a presumption drawn by law. "Murder is the unlawful killing of a human being with malice aforethought, either express or implied." Acts 1891, ch. 80, § 1. It must be (1) a killing; and (2) with malice. The killing of a human being does not constitute murder, but, as Blackstone says, "the grand criterion" which distinguishes murder from other killing is that the killing must be with malice aforethought. 4 Bl. Comm. 198. Judge Christiancy observes: "To give homicide the legal character of murder, all the authorities agree that it must have been perpetrated with malice prepense or aforethought. This malice is just as essential an ingredient of the offense as the act which causes death. Without the concurrence of both, the crime cannot exist; and as every man is presumed to be innocent of the offense of which he is charged, until he is proved to be guilty, this presumption must apply equally to both ingredients of the offense—to malice as well as the killing. Hence, though the principle seems to have been sometimes overlooked, the burden of proof as to each rests equally upon the prosecution, though the one may admit and require more proof than the other." Maher v. People, 10 Mich. 212. It is true, the rule that the law presumes malice from the proof of the killing is sustained by numerous and respectable authorities. The leading authority is Com. v. York, 9 Metc. (Mass.) 93, 1 Benn. & H. Lead. Cr. Cas. 322. But courts and commentators have, especially of late, denied it as a sound legal principle, and condemned it as an excrescence upon the law. The true rule, more accurately stated, and which does not conflict with the presumption of innocence, the burden of proof, nor as to reasonable doubt, we think, is that malice may be implied from the intentional killing, where the jury, from the whole case before them, and beyond a reasonable doubt, find the additional fact that no circumstances of justification or excuse appear, and when there are no circumstances mitigating the killing to that of manslaughter. If there is reasonable doubt as to justification, there is reasonable doubt as to malice. The evidence of the killing may be considered by the jury, together with the whole of the evidence, in ascertaining whether there was malice; but it would be error to tell the jury that the killing alone is presumptive evidence of malice afore-

thought, as it would allow the jury to find malice, without stopping to inquire whether a considerable provocation appeared, or whether the circumstances were such as to show a wicked and malignant heart, which are essential ingredients of implied malice. In discussing this subjet, Mr. Wharton observes: "We must keep in mind that the doctrine that malice and intent are presumptions of law, to be presumed from the mere fact of killing, belongs, even if correct, to purely speculative jurisprudence, and cannot be applied to any case that can possibly arise before the courts." Wharf. Cr. Ev. § 737. This is so, because in no case does the prosecution limit its proofs to the bare fact of a killing. There is always disclosed some surrounding circumstance tending to show how and why it was done. It is from the killing, and all the circumstances disclosed upon the whole case, that the jury determine whether malice has been made out beyond a reasonable doubt. "It is true that we hear occasional utterances, as in Massachusetts, of the old doctrine that malice is to be presumed from the mere act of killing; but whenever this is done it is followed by the admission that, when the facts of the killing are proved, then the malice is to be inferred from the facts. Now, as the facts of the killing are always proved, the idea of abstract malice, being presumed from the abstract killing, has no application to the cases before the court." *Id.* §§ 722, 738. And Mr. Wharton adds: "Should, however, the judge make the proposition not speculative, but regulative; should he direct the jury that the logical inferences of this class are presumptions of law, and tell them to presume malice from the act of killing—then this would be error." *Id.* § 738. That is exactly what was done in this case, and, indeed, the foregoing instructions went even further. They not only told the jury that malice was to be presumed from the killing, but that it devolved upon the defendants to establish the contrary. What is implied malice? "Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show a wicked and malignant heart." Section 3, ch. 80, Acts 1891. Implied malice does not, therefore, arise merely from an intentional killing, but from a killing under such circumstances as that the jury can say that no considerable provocation appeared or that all the circumstances show a wicked and malignant heart. In State v. Vaughan (Nev.), 39 Pac. Rep. 733, 736, the defendant admitted the killing, and claimed self-defense in justification. It was held error to charge that "malice aforethought means an intention to kill." Bigelow, C. J., says: "The fact that the killing was intentional does not necessarily prove that it was done with malice; for an intentional killing may be entirely justifiable, as where it is done in necessary self-defense; or it may be only manslaughter, as where it is done in the heat of passion, caused by no sufficient provocation. What it is must depend on the manner of the killing, and the surrounding circumstances." And the court in that case points out that, inasmuch as the defendant admitted the killing, it was important that the instructions upon this matter should be correct, and that such an instruction was highly prejudicial, under the circumstances. Dennison v. State, 13 Ind. 510; State v. McKinzie, 102 Mo. 620, 15 S. W. Rep. 149; Trumble v. Territory, 3 Wyo. 280, 21 Pac. Rep. 1081; State v. Wingo, 66 Mo. 181; People v. Willett, 36 Hun, 500. The element of implied malice was not merely formal. It involved the real and vital questions contested before the jury in this case. The evidence for the prosecution tended to show that the killing was done without provocation, and was a result of a deliberate purpose, under cover of a pretended arrest and pretended resistance. The evidence for the defense tended to show that the killing was done under circumstances of considerable provocation, after deceased had actually attempted to secure his freedom by slaying his guards. It was for the jury to determine which side spoke the truth. The jury were told that malice was to be implied from the killing, and that the killing by the defendants was established; and therefore the jury were told, in effect, that malice was fully proven, while the evidence for the defense went directly to attack the essential element of implied malice, as defined in the statute.

It will be remembered that the actual killing was done by one of the defendants, yet the jury were told in the fourteenth instruction that the killing done by the "defendants" was established, The instruction then goes on to say that it devolves on the defendants to establish that the "killing done by them" was either excusable or justifiable, and that there was no malice, express or implied, in the killing. Even if it be true that the law imputes malice to him who kills another, the vice running through these instructions is that the legal presumption is raised against both of the defendants, and it is not confined to the one who fired the fatal shot; and in all of them the jury were told that the burden rested upon both defendants, and not merely upon the one who fired the shot, to prove want of malice, and excuse or justification. In the nineteenth they were told that the justification or excuse must be established by the defendants by evidence to the satisfaction of the jury. Even though it be true that the law implies malice from the simple fact of the killing, and even though both defendants had actually participated in the killing, these instructions treat the presumption arising from the killing as though the burden of proof became thereby shifted from the prosecution onto the defendants. The presumption of innocence until guilt is established to the satisfaction of the jury is thus completely brushed away. The defendants were required to prove their innocence as to one of the material and essential elements of the crime of which they were charged, namely, that the killing was not done with malice express or implied. In State v. Payne (Wash.), 39 Pac. Rep. 157, 160, the Washington court, while holding to the old doctrine that malice may be presumed from a killing done with a deadly weapon, say, "Of course it would not be proper to instruct the jury that it was incumbent upon the defendant to overthrow this presumption by testimony in his own behalf." When counsel for the territory drew instruction No. 24, in which the jury were told that not only was malice to be presumed, but that it devolved upon the defendants to show the contrary, he confounded a mere rule of procedure, touching the order of proofs, with the functions of the jury in weighing the testimony, and applied to the latter a rule relating merely to the former. Whart. Cr. Ev. §§ 330, 738. The proofs of the prosecution, no doubt, made out a *prima facie* case amply strong enough to convict. When the defense introduced evidence in explanation and denial, they became actors; but upon the submission of the case it was for the jury to say, upon the whole case, whether every element was established beyond a reasonable doubt, and, if not, to acquit. The presumption of innocence did not end at any particular period in the proofs. It continued throughout the trial, and did not terminate until, upon the whole case, the jury returned their verdict. Whart. Cr. Ev. §§ 330, 331; Coffin v. U. S., 156 U. S. 432, 15 Sup. Ct. Rep. 394;

Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. Rep. 353. "In a criminal case the establishment of a *prima facie* case only does not take away the presumption of a defendant's innocence, nor shift the burden of proof." Ogletree v. State, 28 Ala. 693; 1 Bouv. Law Dict. 227. Suppose the defendants had not introduced any testimony, although they were legally entitled to demand that the jury find every element established beyond a reasonable doubt; yet, if instructions like the fourteenth and twenty-fourth were given, it would be tantamount to directing them to find a verdict of guilty, even though the testimony of the prosecution's witnesses which may have been such as to leave a reasonable doubt of guilt. If the proposition announced in these instructions be correct, the proof of the killing would not only raise a presumption of malice, but that presumption would become proof beyond a reasonable doubt, as a matter of law, unless the defendants successfully assumed the burden of showing the contrary. Such a proposition overturns the fundamental principles of the criminal law. In Chaffee v. U. S., 18 Wall. 516, the jury had been charged that the government need only prove that the defendants were presumptively guilty, and the duty then devolved upon them to establish their innocence, and if they did not they were guilty, beyond a reasonable doubt. Justice Field, speaking for the court, says: "We do not think it at all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the authorities condemn it. The instruction sets at naught established principles." In Coffin v. U. S., 156 U. S. 432, 15 Sup. Ct. Rep. 405, the jury had been charged that when the prohibited acts were knowingly and intentionally done, and their natural and legitimate tendency was to produce injury, the intent to injure is thereby sufficiently established to cast on the accused the burden of showing that their purpose was lawful, and their acts legitimate. The supreme court, per Justice White, say: "The error contained in the charge, which said, substantially, that the burden of proof had shifted, under the circumstances of the case, and that, therefore, it was incumbent on the accused to show the lawfulness of their acts, was not merely verbal, but was fundamental." While the case of the prosecution, made up in part by legal persumptions, may be such as to render it expedient for the defense to produce some evidence to qualify, explain, or deny the facts from which the presumption is sought to be raised, the burden of proof is not thereby changed; and, even if the law permits the jury to infer malice from certain things, it does not require them to do so. People v. Willett, 36 Hun, 500. The presumption of innocence is itself to be considered as evidence in favor of the defendants in every criminal case, under a plea of not guilty. Coffin v. U. S., 156 U. S. 432, 15 Sup. Ct. Rep. 394; Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. Rep. 358. Upon this principle it is easy to reconcile the rule that in no case can the judge peremptorily direct the jury to find a defendant guilty of a crime. Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. Rep. 273. "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused, to establish his innocence, nor to disprove the facts necessary to establish the crime of which he is indicted. It is on the prosecution, from the beginning to the end of the trial, and applied to every element necessary to constitute the crime." Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. Rep. 358. In State v. Wingo, 66 Mo. 181, the trial court had charged that "if the defendant, Wingo, shot and killed Gamble, the law presumed it to be murder in the second degree, in the absence of proof to the contrary; and it devolved upon the defendant to show, from the evidence in the cause, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self-defense." The supreme court held the charge erroneous, saying: "The defendant is entitled to the benefit of a reasonable doubt of his guilt on the whole case, not only as to whether the case made by the State is open to reasonable doubt, but if the evidence for the State be clear, and in the absence of other evidence conclusive, still, if the evidence adduced by the accused, whether it establishes the facts relied upon by a preponderance of the evidence or not, creates a reasonable doubt of his guilt in the minds of the jury, he is entitled to an acquittal. At no stage of the trial does he stand asserting his innocence." In the Stokes Case, 53 N. Y. 164, after an elaborate argument upon this subject, it was held that the jury must be satisfied from the whole evidence of the guilt of the accused; and it was clear error to charge them that when the prosecution has made out a *prima facie* case, and evidence has been introduced tending to show a defense, they must convict, unless they are satisfied of the truth of the defense. "Such a charge," says the court, "throws the burden upon the prisoner, and subjects him to conviction though the evidence on his part may have created a reasonable doubt of his guilt. Instead of leaving it to them to determine upon the whole evidence whether his guilt is established beyond a reasonable doubt, it constrains them to convict unless they are satisfied that he has proved his innocence." In State v. Gassert, 65 Mo. 354, Judge Henry alluded to the difficulty of reconciling the doctrine contained in such instructions as these with elementary principles, but yielded to the force of precedents in that State; but in State v. McKinzie, 102 Mo. 620, 15 S. W. Rep. 149, it was repudiated, and the earlier cases overruled. See, also, State v. Wingo, *supra*; State v. Hill, 69 Mo. 453. But in State v. Evans, 124 Mo. 411, 28 S. W. Rep. 8, it seems to have been restored. In Massachusetts the case of Com. v. York, *supra*, has been greatly modified, if not overruled, in Com. v. Pomeroy, reported Whart. Hom. Append. (2d Ed.) 753, and is so considered by the Supreme Court of the United States in Davis v. U. S., 160 U. S. 481, 16 Sup. Ct. Rep. 353. See, also, Com. v. Hawkins, 3 Gray, 463; U. S. v. Armstrong, 2 Curt. 446, Fed. Cas. No. 14,467. The only case which we have found in this territory which seems to hold that the defendant must prove his innocence of the crime charged is Territory v. Trujillo, 32 Pac. Rep. 154, where it was held that the burden was upon the defendant to prove an alibi. But that ruling is not sustained by sound principle (Whart. Cr. Ev. 333), and is at variance with the rule laid down in Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. 353. An alibi, if true, meets and completely overthrows every allegation against the accused in the indictment. 2 Thomp. Trials, § 2436. Extrinsic defenses which do not traverse the averments of the indictment, it is perhaps true, must be affirmatively shown by the defense, Of this class have been mentioned such as *autrefois acquit*, license command of superior officer, etc. Whart. Cr. Ev. § 331 *et seq.* But such matters of provocation, excuse, or justification which tend to traverse the element of intent or malice must be weighed by the jury, not as a defense, but with all the other evidence, in determining whether every essential element of the crime has been established beyond reasonable doubt. *Id.* § 331; State v.

Porter, 34 Iowa, 131; State v. Hill, 69 Mo. 451; People v. Marshall (Cal.), 44 Pac. Rep. 718; People v. Coughlin (Mich.), 32 N. W. Rep. 905; Coffin v. U. S., Davis v. U. S., and Hickory v. U. S., *supra*.

BICYCLES AS BAGGAGE.

Whether a bicycle is ordinary baggage within the meaning of the law governing common carriers is a question not only of novel interest, but is of considerable importance in view of the very general use now made of such vehicles. That, as yet, the exact point has not been determined by any court of last resort will give special value to a consideration of the authorities leading up to and bearing upon the question.[1] As preliminary to the main question it may be well to emphasize one feature of the law relating to baggage and the origin thereof. In the leading English case of Macrow v. Great Western R. R.,[2] this feature and its origin is very clearly stated by Chief Justice Cockburn as follows: "The impossibility of traveling without the accompaniment of a certain quantity of baggage for the personal comfort and convenience of the traveler has led from the earliest times to the practice on the part of carriers of passengers for hire of carrying, as a matter of course, a reasonable amount of luggage for the accommodation of the passenger, and of considering the remuneration or the carriage of such luggage as comprehended in the fare paid for the conveyance of the passenger." Mr. Lawson in his "Legal Definition of Baggage,"[3] said: "* * * The right of the traveler to take with him his baggage is one accorded by the carrier himself in the earliest era of the business of carrying passengers for hire—an inducement to attract travelers, like an easy seat or a warm car. It has always been for the obvious interest of carriers of passengers to encourage travel by permitting the passenger to take with him what he may require for his personal use on his journey, and this privilege of a reasonable amount of baggage has ripened into a right like any other right of reasonable accommodation." Thus, while it is true that the having certain articles carried without extra compensation arose originally from the indulgence of the carrier, it has long since ripened into a right which the carrier cannot withhold if he would. And while in the beginning the carrier may have carried baggage without remuneration, now he is paid for that service, the price of the service being included in the fare of the passenger. The passenger having paid the regular fare to his point of destination, has the legal right to insist on the carrier's carrying his ordinary baggage—not free of charge, as the respondent claims, but without other compensation therefor than he has already paid in buying his ticket. It is in no sense true that the carrier now gets no pay for transporting ordinary baggage. The only limitation generally placed upon this right of the passenger and the corresponding duty of the carrier, is that which limits the passenger's right to an amount of baggage not exceeding a certain number of pounds in weight. But for this the carrier would be obliged to carry for the price of the regular fare all the property a passenger might have, which fell within the definition of ordinary baggage, without respect to its weight or amount. What, then, is meant by "ordinary baggage?" In Macrow v. Great Western R. R.,[4] Chief Justice Cockburn thus defines "personal" or "ordinary luggage," which is the English term corresponding to "ordinary baggage:" "We hold the true rule to be that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose of the journey, must be considered as personal luggage. This would include, not only all articles of apparel, whether for use or ornament, but also the gun-case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler." This definition is now the accepted definition in England, and it has been cited with approval by

[1] In the preparation of this article liberal use has been made of an exhaustive brief prepared by Franklin Ferriss and J. H. Zumbalen, of the St. Louis bar, in the case of State *ex rel.* Bettis v. Mo. Pac. Ry. Co., before the St. Louis Circuit Court, wherein the question discussed by this paper was considered. It may be well also to state that the court, in its opinion, wherein a bicycle was held to be baggage, adopted substantially the argument and authorities herein reviewed.

[2] 6 Q. B. 612.

[3] 38 Cent. L. J. 5.

[4] *Supra.*

the United States Supreme Court,[5] and by other American courts and law writers.[6] Under Chief Justice Cockburn's definition above quoted, "several things must be observed before it can be said that the particular personal property is or is not baggage. First. The property must be for the personal use or convenience of the passenger, and not for the personal use of another. Second. In ascertaining the necessity of such 'personal use or convenience' we must take into consideration the habits or wants of the passenger. Third. In ascertaining the habits or wants of the passenger, the particular 'class to which he belongs' must be considered. Fourth. The passenger's personal use or convenience according to the habits or wants of the class to which he belongs, must be considered with reference to the immediate necessities or to the ultimate purpose of the journey."[7] A bicycle clearly meets all the requirements of the foregoing definition, when sought to be taken by its owner for his own personal use and convenience. The habits and wants of a bicyclist often occasion the necessity for carrying the bicycle with him for his own personal use and convenience for purposes of recreation, pleasure and locomotion. These habits and wants with respect to the purpose of carrying a bicycle are the same as those of the whole class of wheelmen or bicycle riders, to which he belongs who are in the habit of making railroad journeys for the purpose of carrying them to some favorable point from which they may proceed to use the bicycle for recreation, pleasure, etc., and the ultimate purpose of such journeys is for such use of the wheel. In a recent article in this JOURNAL,[8] in which all the cases on the subject are reviewed, Mr. Lawson gives a definition of the term baggage, supporting each branch thereof by the citation of many adjudicated cases. This definition is as follows: "In the law of common carriers the term baggage means such goods and chattels as the convenience, or comfort, the taste, the pleasure, or the protection of passengers generally makes it fit and proper for the passenger in question to take with him for his personal use, according to the habits or wants of the class to which he belongs, either with reference to the period of transit or the ultimate purpose of the journey." In the leading American case on the subject of baggage,[9] the United States Supreme Court affirmed an instruction given below that baggage could not include such unusual articles as the exceptional fancies, habits or extravagancies of some particular individual prompts him to carry. * * * As the things carried by him must be for his personal use, it is clear that such articles as a lady's sack and muff, or woman's jewelry, when carried in the trunk of a male passenger could not be deemed his baggage. Nor could presents for his friends. * * * Articles for use at the end of the journey, or during a temporary stay at a particular place are as properly baggage as those actually used, or intended to be used in transit. Thus, the gun and case of a sportsman on a shooting tour, or the fishing apparatus of one on a fiishing trip, or the easel of an artist on a sketching trip, are certainly baggage. A leaves his home in the town of C to take up his residence in New York. He takes with him his ordinary wearing apparel, none of which he intends to use on his journey. This is baggage.[10] So A, traveling by rail at night has an opera glass in his trunk. This is baggage.[11] A student on the way to college, carries in his trunk manuscript books which it is necessary for him to study there. These are baggage.[12] In this case it was said: "With a lawyer going to a distant place to attend court; with the author proceeding to his publishers; with the lecturer, traveling to the place where his engagement is to be fulfilled, manuscripts often form, though a small, yet indispensable part of his baggage. They are indispensable to the object of his journey; and, as they are carried with his baggage, in accordance with universal custom, I see no reason why they should not be deemed as necessary a part of his baggage as his novel or his fishing tackle."[13] A further striking illustration of the two branches of the definition involved in the case at bar, is the case of Ry. Co. v. Fraloff.[14] In that case the

[5] Ry. Co. v. Fraloff, 100 U. S. 24.
[6] Gleason v. Transp. Co., 32 Wis. 85; Anderson's Law Dictionary, Black's Dictionary and Bouvier's Dictionary, title Baggage.
[7] See article on "What Constitutes Baggage," 29 Cent. L. J. 206.
[8] 38 Cent. L. J. 5.
[9] Ry. Co. v. Fraloff, 100 U. S. 24.
[10] Dexter v. Ry., 42 N. Y. 326.
[11] Hammond v. Ry., 33 Ind. 379.
[12] Hopkins v. Westcott, 6 Blatchf. 64.
[13] 38 Cent. L. J. 5.
[14] *Supra.*

plaintiff, a Russian woman of wealth who was traveling in America for recreation and health recovered $10,000, for laces lost in transit. The laces were part of her wearing apparel intended for her personal use, not on the journey, but at such places on the route as she might see fit to visit and stop at. In that case the court said:

"The quantity or kind or value of the baggage which a passenger may carry under the contract for the transportation of his person depends upon a variety of circumstances which do not exist in every case. 'That which one traveler,' says Erle, C. J.,[15] 'would consider indispensable, would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind will be taken in the mind of the carrier when he receives a passenger for conveyance * * * To the extent, therefore, that the articles carried by the passenger for his personal use exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible. * * * The laces in question confessedly constituted part of the wearing apparel of the defendant in error. They were adapted to and exclusively designed for personal use, according to her convenience, comfort, or tastes, during the extended journey on which she had entered. They were not merchandise, nor is there any evidence that they were intended for sale or for purposes of business. Whether they were such articles in quantity and value as passengers of like station and under like circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification, or comfort while traveling was not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance from the court as to the law governing such cases." And the judgment for plaintiff for $10,000 was affirmed. Again, a German gentleman, traveling from Germany to California, has in his trunk six dozen shirts, it being shown that in Germany it is the custom, on account of the washing of clothes being done less frequently than in America, for persons like the passenger to keep on hand large quantities of linen, it was held,[16] that all said shirts were baggage. So in Brock v. Gale,[17] it was held that the dental instruments of a traveling dentist are baggage; and in Hannibal Railroad v. Swift,[18] surgical instruments of an army surgeon traveling with troops, were held to be baggage. In Gleason v. Transportation Co.,[19] a traveling salesman's manuscript price book was held ordinary baggage, the court saying: "It must on the whole be held we think that the book in question was an article of personal baggage within the definition above given (quoted from Macrow v. Great Western Ry., *supra*), and the decisions upon the subject. It was a thing of personal use and convenience to the plaintiff according to the wants of the particular class of travelers to which he belonged and was taken by him as well with reference to the immediate necessities of his journey as to the ultimate purposes of it. It was not an article of merchandise or the like, or anything designed for use ulterior to the purposes of his journey, but a book of memoranda convenient and necessary for him personally in accomplishing the object of his travel." In Stub v. Kendrick,[20] the Supreme Court of Indiana ruled the same way concerning a similar price book. In Van Horn v. Kermit,[21] the court said: "I find nothing in the list of goods lost which we can say a passenger making a voyage from a foreign country might not, with propriety, take with him as baggage, or that we can say was not suitable or proper for his personal convenience on the journey, or his amusement and use in the country to which he was bound. His guns for sporting, and the small quantity of clothing materials certainly were not so." And again, in Davis v. Ry. Co.,[22] the New York courts held a sportsman's rifle baggage. In Woods v. Devin,[23] a pocket pistol and a case of dueling pistols were held to be baggage. So, too, a reasonable quantity of tools of a mechanic were held baggage.[24] The telescope of a seafaring man traveling for pleasure is baggage.[25]

[15] 19 C. B. N. S. 321.
[16] Merril v. Grutnell, 30 N. Y. 613.
[17] 14 Fla. 523.
[18] 12 Wall. (U. S.) 272.
[19] 32 Wis. 85.
[20] 121 Ind. 228.
[21] 4 E. D. Smith (N. Y.), 453.
[22] 10 How. Pr. 330.
[23] 13 Ill. 746.
[24] Railroad v. Morrison, 34 Kan. 502; Porter v. Hildebrand, 14 Pa. St. 129, and in Davis v. Ry., *supra*.
[25] Cadwallader v. Railroad, 9 Lower Can. 169.

In Harris v. Great Western Ry.,[26] it was held that a basket of provisions, bacon and poultry, bought in London by a resident of Ealing and intended for household consumption, was personal baggage within the description of the term given in Macrow v. Great Western Ry., and subsequent cases, it appearing that it was customary for the suburban residents, to which class plaintiff belonged, to take baskets of provisions with them on their return journey. In Mauritz v. Ry.,[27] the court said: "Baggage of course, includes wearing apparel, and this is not limited to such apparel only as the traveler must necessarily use on his journey. Regard being had to the condition in life of these parties, the plaintiff may recover for the loss of all such wearing apparel as these people had provided for their personal use, and as it would be necessary or reasonable for them to use after their arrival and settlement in this country. And so I think that cloth not yet made into garments, but which they may have procured for manufacture into wearing apparel, and which they intended to make such use of, to a reasonable amount, may properly be included as part of their wearing apparel." In Parmelee v. Fischer,[28] and Quimit v. Henshaw,[29] feather beds, pillows and bed-quilts, not intended for use on the journey, but at its end were held baggage. In Ry. v. Hammond,[30] the court said: "An opera glass is as useful to the traveler as a few books for amusement, or more so. That the trip was from Toledo to Peru and was made in the night can make no difference. Articles for use at the end of the journey, or during a temporary stay at a particular place are as properly baggage as those actually used in the transit." The foregoing cases clearly show that it cannot be affirmed that any particular kinds or species of chattels generally are comprehended under the term ordinary baggage. Whether a particular chattel is baggage depends not upon its general character, whether a vehicle or a fire arm or clothing or a time-piece, but upon entirely different considerations. Either of the above mentioned kinds of articles may be baggage in certain circumstances, while under different circumstances, neither kind would be baggage. "The same article may be baggage or not according to the purpose for which it is carried; as a watch for sale is merchandise, one for time is baggage. With approximate accuracy, baggage may be said to consist of whatever, connected with the objects of the journey, and not exceeding the limits of reason and custom, the traveler takes with him for his personal use, whether during actual travel, or intervals between trips, or upon its termination. And it has been held to extend even to what, within the custom of travelers, he carries for his family."[31] "It is evident that that which may be convenient or necessary for one person might not be so for another, or that that which might appropriately and properly be classed as baggage upon one journey, and for one purpose, might not be so for another journey and for another purpose. That which might be a convenience and almost a necessity for a traveler in one condition of life might be superfluous and wholly useless in the case of another whose habits and condition in life were wholly different.[32] "It will at once be seen from the examples that it is not necessary, to constitute baggage, that the articles which are being carried as such should be intended for the use, comfort or convenience of the passenger on his journey, and that the liability of the carrier will not be limited to such apparel or other articles as might be used or needed by the way."[33] "So, although the articles which the passenger may claim as baggage may not be such as are usually carried by passengers as personal baggage, and may indeed be but rarely carried with the traveler, and may be wholly useless to him for the purpose of comfort or convenience on the journey, yet if they be such as are appropriate or essential to the purposes of the journey, whether it be for pleasure or for business, they may be considered as baggage, and the carrier may be held responsible for them as such; as in the case of the gun or the fishing apparatus of the sportsman, so often referred to in cases upon this subject as baggage under such circumstances, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character the use of which is personal

[26] 54 Law Times, 292.
[27] (U. S. C. C. Wis.) 21 Am. & Eng. R. R. Cases, 487.
[28] 22 Ill. 212.
[29] 35 Vt. 622.
[30] 33 Ind. 379.
[31] Bishop on Non-contract Law, sec. 1156.
[32] Hutchinson on Carriers, sec. 679.
[33] *Ibid.* sec. 686.

to the traveler, and the taking of which has arisen from the fact of his journeying."[34] It can hardly be said that a bicycle is not baggage because of its size and cumbersome character. The primary definition of its English equivalent, luggage, would seem to dispose of that question. Webster defines luggage to be "any thing cumbersome and heavy to be carried; something of more weight than value;" Dr. Johnson defined it, "anything cumbrous and unwieldy that is to be carried away; anything of more weight than value;" and the American Encyclopædic Dictionary gives the same definition as Webster. While the bicycle hardly comes within the definition as regards weight, it certainly disposes of the fallacy that nothing can be baggage which cannot be crowded into a hand bag. Neither can it be seriously contended that the bicycle comes within the rule that "things that only an eccentric person or a crank would carry with him are not baggage" as laid down in one of the cases.[35]

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[34] *Ibid.* sec. 987.

[35] Hudston v. Ry. Co., 36 L. J. Rep. 213.

DECEIT — FALSE REPRESENTATIONS—SALE OF STOCK.

MURRAY v. TOLMAN.

Opinion, October 9, 1896.

1. Representations by the president of a bank to a customer that stock in a corporation of which he was the promoter and principal stockholder was worth a sum in excess of its par value, would yield certain dividends and prove a profitable investment, made while he knew that it was the intention to do business not authorized by the charter and to so manage it that he and the bank would acquire all the assets, are not within the rule that a purchaser cannot avoid his contract because of false statements of the seller as to the value of the thing sold.

2. Representations made by a vendor as to the value of the thing sold to a vendee who is wholly ignorant of such value and who relies upon such representations, which were given as facts and not as a mere opinion, are binding upon such vendor.

MR. JUSTICE CARTER, delivered the opinion of the court: Thomas W. B. Murray filed his bill in equity in the circuit court of Cook county, against Daniel H. Tolman, the Midland Company, the Chicago Trust and Savings Bank, and others, for the rescission of a certain contract of purchase of ten shares of the capital stock of said Midland Company, alleged to have been obtained by Tolman from Murray by fraud, and for an accounting of payments therefor, and of certain payments of usurious interest on two certain judgment notes, of $1,000 each, given by said Murray, and held, as alleged, by the defendants or some of them, and for the cancellation and delivering up of said notes, and for an injunction to prevent the assignment of said notes or the entry of judgment thereon. On the report by the master of the evidence and of his conclusions, Murray amended his bill and the defendants filed amendments to their answers. The issues as made were found in favor of Murray, the master finding that the allegations of the bill were in substance fully sustained, and the court decreed accordingly. This decree was reversed in the Appellate Court for the First District and the bill ordered dismissed. From that judgment Murray has taken this appeal.

The record is voluminous, and we cannot undertake to set out here anything more than the bare substance of the case as we find it to be.

It appears that Tolman was the president and principal stockholder of the Chicago Trust and Savings Bank, which, for convenience, is called the bank. Murray was a manufacturer of tents, awnings, etc., and had occasion to borrow money on short time, and had borrowed money from the bank through Tolman. Afterward, and before such borrowed money was repaid, Tolman called upon Murray at his place of business and represented to him that he was getting up a company to accommodate such men as he, who needed money on short time; that the company was on the mutual principle of building and loan associations, and organized to guarantee the payment of moneys which should be borrowed by its members. Murray had never before heard of the Midland Company, and knew nothing of its object, its organization or of the value of its stock, except what he was told by Tolman. The conversations on the subject sought and had by Tolmam with Murray were three or four in number, and extended over a period of about three weeks, in April, 1888. He represented to Murray that members of the company could borrow money on its guaranty at six per cent. and while they would pay to the company one per cent. per month for its guaranty, the dividends they would receive as stockholders would amount to twenty-five per cent. and proceeded to demonstrate to Murray how the plan would work out the results as stated by him. Murray testified that Tolman figured it out to his satisfaction at the time, but that he could not himself reproduce or explain it. Murray replied to Tolman that he did not need to borrow money in that way, but that he could get all the money he wanted at his bank. Tolman assured him, however, that it was a profitable investment anyway; that there were other men in it whose names he knew who did not need to borrow money; that it would pay twenty-five per cent. on the money invested, and so figured it out to him; represented that the stock was then worth $150 for each share of $100; that Murray could sell it for that if he got tired of his bargain, and that he would himself buy it back at that

figure. The promise to repurchase was repeated more than once. Without any other information of the company, its charter powers or the value of its stock than that given to him by Tolman, and relying upon its correctness and the truth of Tolman's statements and promises, Murray signed a paper produced by Tolman, reading as follows: "The Midland Company having been established with a capital stock of $100,000, divided into one thousand shares, we, the undersigned, hereby subscribe for and agree to purchase of D. H. Tolman the number of shares of stock of said company set opposite our respective names, paying therefore $150, and to take delivery at the Chicago Trust and Savings Bank May 5, 1888." This paper was eventually signed by upwards of one hundred persons. The articles of incorporation were not, nor was any writing purporting to show the purpose of the incorporation or its charter powers, produced or shown to Murray, but he relied entirely upon the truth of the statements and representations of Tolman without making any independent inquiry or investigation. Some time afterward Murray applied to Tolman to redeem his promise and to repurchase the stock, but was told by Tolman that he had all of the Midland stock he wanted then, but that Murray should come again in the spring. In the spring he refused to buy, and afterward, about two and one-half years after obtaining the stock, Murray tendered it back to Tolman and demanded the return of the purchase money, but was refused. Soon thereafter this bill was filed.

Prior to signing the paper above mentioned by Murray, Tolman had caused an application to be made to the secretary of state for articles of incorporation of said company, showing that its object was to guarantee commercial paper and to deal therein, but the application had been refused by the secretary, with the information that articles of incorporation would not be issued on such a statement. He then caused another application to be made for a charter, containing the statement that the object for which the corporation was formed was to secure information and furnish statements concerning the responsibility of persons and corporations, to conduct a merchandise commission business and to contract in respect thereto, so that Tolman knew that his representations to Murray as to the object, purposes and charter powers of the Midland Company were false. He had special information and knowledge also on that subject which he concealed from Murray. The application for incorporation was made at the instance of Tolman, by employees in his bank. The company was paid for its stock by a check on the bank of $50,000 by Tolman for the stock subscribed for by him, and by his checks given to four others who, at his instance, had subscribed for the other $50,000 and which checks they turned over to the company, and the whole $100,000 was placed to the credit of the company on the books of the bank. Tolman parceled out the stock to those who, like Murray, had agreed to purchase from him at an advance of fifty per cent. and in this way realized a profit of $50,000 almost as soon as the company was organized, and by subsequent purchases and sales before its final collapse an additional amount of more than double this amount. It does not appear that he was possessed of the same confidence in the eventual success and dividend-paying power of the company that he was able to inspire in others, for when the final collapse came he did not own any of the stock,—at least not any considerable amount of it. Of this $100,000 placed to the credit of the company it seems that $62,500 was invested in the purchase of $50,000 of the capital stock of the bank, although such stock was paid up only to the extent of sixty per cent. of its face value, and the other $37,500 was consumed in taking up and paying to the bank the paper of its members which it had guaranteed and which they had failed to pay.

As soon as the company had been organized, it proceeded under the direction and management of Tolman, to engage in a business for which it was not incorporated, viz., the guaranteeing of the commercial paper of its members, and although it charged and received one per cent. per month for such guarantees the promised dividends were not forthcoming, but Tolman and the bank soon became possessed of substantially all that was valuable of its capital. Borrowers were charged usurious rates of interest,—often as high as two and one-half per cent. per month; and it is apparent from the evidence that, aside from the merely speculative purposes of Tolman in dealing in and manipulating the shares of stock, the purpose of the corporation was to afford a cover and blind for the charging and collection of usurious rates of interest, and to insure the safe collection of loans by having an indorser under the same management as the bank, which would be financially responsible as long as its capital, supplied by the borrowers, should hold out. It is also clear that Tolman knew, when he represented to Murray that the stock was worth $150 per share and would earn twenty-five per cent. in dividends yearly, that such representations were false. Not only so, but he must have known that the stock could not long remain at its face value, but that under the management which he then had in contemplation, substantially the entire capital of the company would eventually pass to himself or to the bank, of which he was the principal stockholder, and that the whole purchase money would be lost to Murray. Not only so, but he knew at the time that Murray was ignorant of these facts and of his contemplated fraud, and relied upon his statements and representations, and reposed confidence in him as the president of the bank at which he had borrowed money and as the promoter and principal stockholder in the Midland Company, and as one trusted by many others whom he knew; and the evidence warrants the conclusion, that in

order to dispel any doubts which Murray might have, and to prevent any independent inquiry or investigation, and with the fraudulent intent of breaking his promise and of swindling Murray, he promised Murray he would repurchase the stock at the same price whenever he, Murray, should tire of his bargain. In this view we think the promise proper to be considered. Cooley on Torts, 487.

We are disposed to agree with the views expressed by Mr. Justice Waterman in his dissenting opinion in the appellate court, that Tolman was in a position to know what the value of the stock was, and necessarily had knowledge of its value which no other person could obtain except with his consent and assistance, and that, in view of all the circumstances, Murray did as men of ordinary business experience would likely do under such circumstances if they decided to take the stock—that is, decided to take it relying upon the statements and representations of Tolman—and that cases of this character fall within well recognized exceptions to the general rule that the vendee is not authorized to rely upon the statements of the vendor as to the value of the subject-matter of the contract as representations upon which he may avoid the contract if shown to be false, but that "where the vendee is wholly ignorant of the value of the property, and the vendor knows this, and also knows that the vendee is relying upon his (the vendor's) representation as to value, and such representation is not a mere expression of opinion but is made as a statement of fact, which statement the vendor knows to be untrue, such a statement is a representation by which the vendor is bound." Pomeroy's Eq. Jur. Secs. 878, 879; Pickard v. McCormick, 11 Mich. 68.

Much that was said by Judge Campbell in delivering the opinion of the court in the Pickard Case might well be said of the case at bar. "It is undoubtedly true," he said, "that value is usually a mere matter of opinion, and that the purchaser must expect that a vendor will seek to enhance his wares and must disregard his statements of their value. But while this is generally the case, yet we are aware of no rule which determines, arbitrarily, that any class of fraudulent misrepresentations can be exempted from the consequences attached to others. Where a purchaser without negligence has been induced, by the arts of a cheating seller, to rely upon material statements which are knowingly false, and is thereby damnified, it can make no difference in what respect he has been deceived if the deceit was material and relied on. It is only because statements of value can rarely be supposed to have induced a purchase without negligence, that the authorities have laid down the principle that they cannot usually avoid a bargain. * * * In the case before us the alleged fraud consisted of false statements by a jeweler to an unskilled purchaser of the value of articles which none but an expert could be reasonably supposed to understand. The dealer knew of the purchaser's ignorance, and deliberately and designedly availed himself of it to defraud him. We think that it cannot be laid down as a matter of law that value is never a material fact, and we think the circumstances of this case illustrate the impropriety of any such rule. They show a plain and aggravated case of cheating, and it would be a deserved reproach to the law if it exempted any specific fraud from a remedial action where a fact is stated and relied upon, whatever may be the general difficulty of defrauding by means of it." See, also, Kost v. Bender, 25 Mich. 515. Allen v. Hart, 72 Ill. 104, is to the same effect. See Holdom v. Ayer, 110 Ill. 448.

With a fraudulent intent Tolman represented that the company was organized on the principle of building and loan associations. Murray doubtless had some general knowledge of such corporations, and knew that they were recognized as lawful incorporations and understood to be profitable in many cases. Nor can it be said from this record that Murray was induced to enter into the contract through his mistake or ignorance of the law, or by the misrepresentations of Tolman as to matters of law merely. Some of the false representations of Tolman certainly did pertain to questions of law, but they were accompanied by false representations of material facts, and from the respective positions of the parties and the attendant circumstances were calculated to deceive, particularly when his statements of fact were demonstrated by an arithmetical calculation which Tolman must have known, but Murray did not know, to be false and deceptive.

In Williams v. Rhodes, 81 Ill. 571, it was said (p. 586): "It has been held by this court, in general terms, that a court af equity will not relieve on account of ignorance of the law where the facts are known. Goltra v. Sanasack, 53 Ill. 456; Wood v. Price, 46 *Id.* 439. To this there may be exceptions, which we should recognize in cases of imposition, undue influence, misplaced confidence, surprise, etc." See, also, Gordere v. Downing, 18 Ill. 492. But, as we have seen, in the case at bar the facts were unknown to Murray and known to Tolman, and were falsely represented to Murray by Tolman, and to our minds the case presents, in all its phases, a very clear exception to the general rule. See 2 Pomeroy's Eq. Jur. Sec. 847; Kerr on Fraud, 90; Broadwell v. Broadwell, 1 Gilm. 599; Townsend v. Cowles, 31 Ala. 428; Moreland v. Atchison, 19 Tex. 303.

The organization of the company was itself a fraudulent device, gotten up by Tolman for an unlawful purpose, and to enrich himself, by fraudulent means, at the expense of the unwary. Indeed, we do not understand his counsel to seriously contend that the evidence does not show this. But among other things it is insisted that Murray has been guilty of laches, and for that reason is not entitled to relief. We cannot so find from the record. There has been no unreasonable delay, after ascertainment of the facts, in

filing the bill. It does not appear that the rights of any third party will be prejudiced, nor is it perceived how Tolman is injured by the delay.

There was an accounting of usurious interest paid by Murray to Tolman on his note of $1,000, which the master was, we think, justified in finding was given in renewal of previous notes signed by Murray and one Long, and it was found that there was a balance due Tolman on this note, after deducting such usurious interest, of $723.91. which was ordered to be deducted from the prinpal and interest thereon paid by Murray for said ten shares of stock, and the decree directed the surrender of the note and the payment by Tolman to Murray of the balance. It is objected that the decree does not direct the reassignment and delivery of the shares of the stock to Tolman. The decree is not as specific, perhaps, as it should have been in this respect, but we think a fair construction of it makes it incumbent on Murray to do this, and that he cannot have the decree enforced otherwise.

Objection is also made to the equitable jurisdiction of the court; but in view of the allegations of the bill and the evidence we think it a case for cognizance in a court of equity.

Other minor questions are raised. One is in respect to the decree as to the surrender by the Midland Company of a note of Murray on the payment of a certain amount provided in the decree, but as that company did not appeal we do not see how that matter concerns the other defendant.

On the whole, we think the case was properly decided in the trial court. The judgment of the appellate court will therefore be reversed and the decree of the circuit court will be affirmed. Judgment reversed.

NOTE.—The principal case constitutes a forcible and interesting exception to the general and well settled rule that mere misrepresentations in the nature of opinions as to the value of corporate stock, in themselves, afford no legal ground of complaint by the purchaser against the seller. The law governing the sale of corporate stock and the effect of false representations by officers of the corporation in the sale thereof does not differ substantially from that in reference to the sale of anything else. There are, however, certain rules governing questions of this character which are of universal application: 1. The representations must have been made with an intent to deceive. Peck v. Gurney, L. R. 6 H. L. 377. Lord Romilly in Pulsford v. Richards, 22 L. J. Ch. 569, says that this doctrine "applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements false in fact were made by persons who believed them to be true, if in the due discharge of their duty they ought to have known, or if they had formerly known, and ought to have remembered the fact which negatived the representation made." The representations must not only have been false in fact, but they must have been made with an intent to deceive. Arthur v. Griswold, 55 N. Y. 400; Wakeman v. Dalley, 51 N. Y. 27; Cazeaux v. Mali, 25 Barb. 578; Morgan v. Skiddy, 62 N. Y. 319; Ship v. Crosskill, L. R. 10 Eq. 73. But though there is some confusion upon this point as authority, we apprehend that it is not necessary to show that the defendants knew that the representations were untrue (but see Addington v. Allen, 11 Wend. 374; Fusz v. Spaunhorst, 67 Mo. 256), but that it will be sufficient that it be made to appear that they made them with a fraudulent mind and motive intending to induce the plaintiff to act as he did and indifferent as to whether they were true or not. Taylor v. Ashton, 11 Mees. & W. 401; Leffman v. Flannigan, 5 Phila. 1. 2. The deceit must consist either in misrepresentations of facts or in suppression of the truth. This rule is very clear in case where the action is against the corporation for a rescission and there does not seem to be any reason why it should not apply as well where the action is against the officer of the corporation for the deceit. See note of Seymour D. Thompson to case of Edgington v. Fitzmaurice (Eng. Ct. App.), 22 Cent. L. J. 81. 3. It is wholly immaterial with what object the false statement is made, with this exception, that it is material that the defendant should intend that it should be relied on by the person to whom he makes it. Bower, L. J., in Edgington v. Fitzmaurice (Eng. Ct. App.), 22 Cent. L. J. 81; Smith v. Chadwick, 9 App. Cas. 187; Peek v. Gurney, L. R. 6 H. L. 377. Judge Thompson in the note to Edgington v. Fitzmaurice, *supra*, observes that "some caution is necessary to be exercised on this point. We apprehend that it is not true that the person making the representation, in order to be liable in damages for the deceit, should have intended that it should be relied and acted upon by the particular person who brings the action; but that it is sufficient if he intended that it should be relied and acted upon by the general class of persons to which the plaintiff belongs. Wortner v. Sharp, 4 C. B. 404. A fraudulent prospectus or report concocted by the directors of a company for the purpose of deceiving the public generally as to the condition of the company, with the view of inducing the public to purchase its shares, will, if seen, believed and acted upon by any member of the public, afford ground for avoiding his contract of subscription, and for recovering damages from the directors for the deceit. We apprehend that it is the law that if a man turns loose a lie intending that it shall catch some one, no matter whom, and induce him to act in a particular way, any one whom it chances to catch and whom it chances to induce to act in that particular way, may maintain an action against the former for the damages which he thereby sustains. But here the doctrine of proximate and remote cause comes in; and it seems to be the law that a man who publishes a lie will not be liable in an action for deceit to anyone who may be incidentally or collaterally injured by it. For instance, where the directors of a company put forth a false statement concerning its affairs, which induced A to purchase some of its shares from B, another shareholder, it was held that B was not entitled because of the false statement to escape liability as a contributory of the company on its being wound up by reason of its insolvency; since the misrepresentations were not made to him or for the purpose of deceiving him. *Ex parte* Worth, 4 Drew, 529. If this is good law, as to which we confess a doubt, it would apply with equal or stronger force to an action for damages for the deceit." 4. The fraudulent representation must have been a material inducement to the contract. All the cases agree whether the action be in equity against the corporation for a rescission, or at law against the directors for damages for the deceit, that, in order to sustain it, the fraudulent representation must have been a material inducement to the

making of the contract; it must have been the thing which led the plaintiff to act as he did to his damage. Or, to borrow an expression from the civil law, sometimes used by courts of equity in cases of this kind, it must have been a misrepresentation *dans locum contractui*, which is understood to mean a misrepresentation giving occasion to the contract—the assertion of a fact on which the person entering into the contract relied, in the absence of which it is reasonable to infer that he would not have entered into it. Pulsford v. Richards, 22 L. J. Ch. 569. Another expression of this principle is that the misreprensentation must have been a proximate or immediate cause or inducement to the purchase of the shares or debentures. Where the person who was induced to purchase the shares of the company knew as much about its affairs as the directors who put forth the false prospectus, it was held that he was not entitled to a rescission. Jennings v. Broughton, 22 L. J. Ch. 585; Salem Mill Dam Corp. v. Ropes, 9 Pick. 187. For general statement of the law governing false representations, see 30 Cent. L. J. 100.

Late Cases on Subject of Deceit in Sale of Corporate Stock.—In an action against defendant for alleged false representations regarding the value of certain stock which plaintiff was induced to buy in May, 1880, it cannot be said, as matter of law, that if the plaintiff was induced to purchase the stock in consequence of the fraudulent representations of the defendant as to its value, the same representations may not have continued in the mind of the plaintiff, and induced him to accept more stock in April, 1881; and neither can it be so said, although the plaintiff, after buying the first lot of stock, had become a director in the company, and had independent means of knowledge as to its value. Reeve v. Dennett (Mass.), 11 N. E. Rep. 938. Plaintiff who was engagedin the ice business, of which defendant was ignorant, urged the latter to invest in a new enterprise in such business, representing that certain property purchased for the purpose cost $20,000, when the actual price was $14,000. Defendant invested on the basis of the statement and secured a one-third interest in a corporation formed for the purpose, paying more than the other two-thirds together cost plaintiff and another. Plaintiff had been defendant's confidential business adviser, and enjoined secrecy in this operation. Held, that the representation was one of fact and not of opinon, and was actionable. Teachout v. Van Hoesen (Iowa), 40 N. W. Rep. 96. In an action for fraudulent representations in the sale of stock, where the petition alleges that plaintiff relied on such representations, it need not directly allege intent or purpose on the part of the defendant to mislead plaintiff. Johnson v. Parrotte (Neb.), 36 N. W. Rep. 497. In an action for fraudulent representations alleged to have been made as to the value of a stock of goods sold to plaintiff, the court should instruct the jury as to the difference between representations of actual value, and mere expressions of opinion. Jenne v. Gilbert (Neb.), 42 N. W. Rep. 415. Where dividends in a corporation are declared on statements containing many improper items as assets, and which indicate an apparent purpose to make large showings of profits, it sufficiently appears that defendant, the president of the corporation, who was a man of business experience, and who paid close attention to the affairs of the corporation, knew that the dividends were improperly declared, and his representation to plaintiffs to induce them to take stock, that dividends had been earned, will be held to have been made with wrongful intent. Hubbard v. Weare (Iowa), 44 N. W. Rep. 915. Where managers of a corporation made false report, or resort to fraudulent devices, and thereby induce persons to take stock, such purchasers, in order to recover in an action for fraud and deceit, must show that they acted upon the faith of the representations. Priest v. White (Mo.), 1 S. W. Rep. 361. Where it appears that a stockholder of a corporation paid but casual attention to its business, had nothing to do with making the statements on which the dividends were declared, denies ever having examined them, never made an investigation into the affairs of the corporation, and had full confidence in the president, and that he purchased more stock after the latter had made representations to him as to the earnings of the corporation, it will be held that he did so in reliance on such representations. Hubbard v. Weare (Iowa), 44 N. W. Rep. 915. Where a subscription for corporate stock is obtained by the representation that a prominent business man has subscribed for a large amount, and the fact that he had paid nothing for his stock is concealed, such concealment makes the representation fraudulent. Coles v. Kennedy (Iowa), 46 N. W. Rep. 1088. The false representations of defendants, by which plaintiff alleged he was induced to purchase stock in a corporation, were that it was doing a good business, and making 10 per cent. profit, and that with additional capital it would make more. The corporation had been in existence a very short time, and defendant superintended the manufacturing part of its business, but there was no evidence that they knew its financial condition, or that they intended to convey the impression that they had such knowledge. Held, that the jury were not justified in finding that defendants made the representations knowing them to be false, and a verdict for plaintiff for damages therefor could not be sustained. Hatch v. Spooner, 13 N. Y. S. 642, 59 Hun, 625. In an action for fraudulent representations in the sale to plaintiff of certain shares of corporate stock, a written agreement of the parties was put in evidence, reciting that 50 per cent. of the par value had been paid in cash, and 25 per cent. by a declaration of dividend out of net profits, and setting out the alleged financial condition of the company, and providing that the trade was to be conditioned upon the representations as to the condition of the business and stock of said company, which might be verified by an examination of its affairs by an expert book-keeper of plaintiff's selection, and at his expense. Held, that plaintiff's right to recover upon such representations, as fraudulent, is not concluded by his failure to avail himself of the right to make such examination through an expert. Blacknall v. Rowland (N. C.), 13 S. E. Rep. 191. In an action against the shareholders and officers of a corporation for misrepresentation and deceit in the sale of shares of stock to plaintiff, representations that the stock of the corporation would pay as much as 20 per cent. dividends furnish no ground for recovery. Robinson v. Parks (Md.), 24 Atl. Rep. 411. A purchase of stock from a stockholder at a low price, by an officer of the corporation, is not fraudulent because such officer had knowledge in his official capacity of favorable sales of other stock, which enhanced the value of the stock generally, and of which fact the seller was ignorant. Crowell v. Jackson (N. J. Err. & App.), 23 Atl. Rep. 426, 53 N. J. Law, 656. If a member of a corporation, offering his stock for sale, falsely and fraudulently represents that the corporation is not in debt, and is making profits of a specified amount, and thereby induces one to purchase his stock, he is responsible in an action for deceit, even though the purchaser might have discovered it by investigation into

the affairs of the corporation. Redding v. Wright (Minn.), 51 N. W. Rep. 1056. A seller's false statement that the stock he is offering has always paid a certain rate in dividends is a positive statement of a material fact, on which the buyer has the right to rely. Handy v. Waldron (R. I.), 29 Atl. Rep. 143. Representations by one bank to another that a corporation "is prosperous," "well organized," "doing a large business," and are "valued customers of ours;" that an investigation of its business and responsibility had been made by the vice-president and cashier of the bank, coupled with the transmission of an annual statement, which (as alleged) is known to be false,—are representations of fact, and not of opinion, and are actionable if fraudulently made. Nevada Bank v. Portland Nat. Bank (U. S. C. C.), 59 Fed. Rep. 338. Defendant, a corporation, by its president, wrote to the owner of certain land, to be used in the sale of mortgage bonds, stating, *inter alia*, that "we have in our possession the original documents printed in the advertisements of your bonds secured by mortgage to this company as trustee upon the H tract in this city. We indorse the estimates of value contained thereon, made by" certain persons named, "all of whom are known as men of integrity and sound judgment touching local real estate value." "We are of the opinion that" it "is adequate security for the amount of your proposed loan." Held, that such statements were mere opinions, and, though false, actions for deceit will not lie in favor of persons to whom they were made for the purpose of inducing them to invest in bonds secured by the mortgage therein referred to. Nash v. Minnesota Title Insurance & Trust Co. (Mass.), 34 N. E. Rep. 625, 159 Mass. 437. Defendant, a corporation, by its president, wrote to the owner of certain land, to be used in the sale of mortgage bonds, making false representations as to the character of the security. Held, in an action for deceit, that defendant is liable only to purchasers of bonds from the owner of the land to whom the letter was addressed, and not to those who afterwards bought of such purchasers, since the letter was not intended to aid the first purchasers in selling to others. Nash v. Minnesota Title Insurance & Trust Co. (Mass.), 34 N. E. Rep. 625, 159 Mass. 437. In an action against the president of a bank, for damages to one who was induced to purchase stock of the bank for more than its value through a false statement of the bank's condition, knowingly made by defendant to plaintiff's agent, plaintiff's right to recover is not affected by the fact that the agent, being a director of the bank, might have informed himself of its true condition, it not appearing that the agent had actual knowledge of the falsity of defendant's statement. Trimble v. Ward (Ky.), 31 S. W. Rep. 864. Where the officers of a corporation make false representations to a stockholder as to its financial condition, with knowledge that he desires the information so that he may determine which of two offers for his stock to accept, and the stockholder, acting thereon, accepts the offer in which part of the purchase price was conditioned on the payment of dividends by the corporation, they are liable, in case no such dividends are paid, for the difference between the sum obtained by the stockholder and the sum he would have obtained if he had accepted the other offer, provided he would have so done if he had known the corporation's condition. Rothmiller v. Stein (N. Y. App.), 38 N. E. Rep. 718, 143 N. Y. 581. Where a vendee of mining stock sought to recover for false statements by the vendor that the stock was a good investment at the price paid, that the property represented by the stock was in good and promising condition, that the mines were being rapidly developed, and that ore had been sold or was ready to be sold from some of them, the question whether these statements were made and relied upon as statements of existing facts, or as mere expressions of opinion, was for the jury. Warner v. Benjamin, 62 N. W. Rep. 179, 89 Wis. 290. One induced to subscribe for certificates alleged to represent an increase of the capital stock of a national bank, at a time when no increase had been authorized, on false representations of the cashier as to the bank's condition, it being in fact insolvent at the time, is entitled to a judgment against the bank and its receiver for the purchase money paid. Newbegin v. Newton Nat. Bank, 66 Fed. Rep. 701, 14 C. C. A. 71. One who, having no means of ascertaining the condition of a corporation, is induced to purchase stock thereof that is worthless, by the false representation of a corporate officer who has knowledge of its condition, may maintain an action for damages. Carruth v. Harris (Neb.), 60 N. W. Rep. 106, 41 Neb. 789.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADJOINING LANDOWNERS—Interference with Light.—Where a well and a tree stand on the line between two lots, one owner cannot enjoin the other from building to the line, and thus interfering with the well and the tree, and the free access of light and air to the windows of plaintiff's house, because he has offered to buy the land in controversy, where such offer was merely to pay such sum therefor as it should be appraised at by persons to be selected by plaintiff and defendant.—ROBINSON v. CLAPP, Conn., 35 Atl. Rep. 504.

2. APPEAL.—Under Civ. Code, § 78, requiring appellate courts to disregard any error not affecting the substantial rights of the parties, the mere admission of evidence after a case has been closed, or even on a reargument granted without objection after judgment had been once rendered, will not authorize a reversal on appeal, where it is not shown or claimed that the evidence was not properly admissible, or that the judgment finally rendered was incorrect.—NEWKIRK v. NOBLE, Colo., 46 Pac. Rep. 15.

3. ASSIGNMENTS FOR CREDITORS—Rights of Trustee—Law of Texas.—In an action brought by the trustee in a deed of trust for the benefit of creditors, executed in Texas, against an attaching creditor, for the conversion of the property conveyed by such deed of trust, an instruction that if, before the attachment, any creditor, without notice of any fraud by the assignors, had accepted the deed of trust, the trustee was entitled

to recover the whole value of the property converted, is not open to any objection or complaint by the trustee.—SONNENTHEIL v. CHRISTIAN MOERLEIN BREWING CO., U. S. C. C. of App., 75 Fed. Rep. 350.

4. BOND — Forgery of Principal's Name.—In an action on a bond, the allegation that "defendants bound themselves by a writing under seal" is a sufficient averment of its delivery. In an action on a bond against H as principal and C as surety, C admitted the delivery of the bond, regular on its face, as alleged, but set up by a special answer that H's signature to the bond was a forgery. He did not allege that he had no knowledge of the forgery at the time he executed and delivered the bond, or that he did not intend to bind himself notwithstanding: Held, that want of knowledge could not be assumed in his favor, and hence the answer was demurrable.—JACOBS v. CURTISS, Conn., 35 Atl. Rep. 501.

5. BUILDING AND LOAN ASSOCIATIONS — Construction of By-law.—Under a by-law of a building association, providing that "borrowing members who shall neglect to pay any installments as the same become due shall pay to the association a fine of 20 cents per month on each $100 that they have borrowed from the association," the fine for one month is not repeated and added to that of each succeeding month, making the amount increase in arithmetical progression, but only 20 cents on each $100 can be imposed in any one month.—DUPUY v. EASTERN BUILDING & LOAN ASSN., Va., 25 S. E. Rep. 987.

6. CARRIERS—Limiting Liability.—A common carrier cannot limit his common-law liability by a special contract in writing with the shipper, unless it is freely and fairly made; and the carrier cannot exact, as a condition precedent for carrying stock or goods, that the shipper must sign a contract in writing limiting or changing a common-law liability. If the carrier has two rates or charges for carrying stock or goods,—one if carried under the old common-law liability, and the other if carried under a special contract,—the shipper must have real freedom of choice in making his election.—ATCHISON, T. & S. F. R. CO. v. MASON, Kan., 46 Pac. Rep. 31.

7. CARRIERS OF PASSENGERS—Liability as to Baggage. —The omission of a passenger to call for her trunk until the day following that of arrival at her destination is, under ordinary circumstances, unreasonable, and therefore the carrier ceases to be responsible as such, and is liable merely as a warehouseman.—WIEGAND v. CENTRAL R. CO. OF NEW JERSEY, U. S. C. C. (Penn.), 75 Fed. Rep. 870.

8. COMPROMISE.—Where a creditor accepts from his debtor a part of an unliquidated demand against him, in full settlement and compromise thereof, such act is a defense and bar to an action by the creditor against the debtor for the original demand, unless it be pleaded and proved that the settlement was procured by fraud, mistake, or duress.—HOME FIRE INS. CO. v. BREDENDOPT, Neb., 68 N. W. Rep. 400.

9. CONTEMPT.—The plaintiff in a judgment obtained in a justice's court, which has been carried by *certiorari* to the superior court, does not place himself in contempt of the latter court by suing out a garnishment upon that judgment during the pendency of the *certiorari*.—MILLER v. GAY, Ga., 25 S. E. Rep. 577.

10. CONTRACT — Reformation.—Where a contract for the sale of property has been executed by a conveyance by the vendor and the giving of notes for unpaid purchase money by the purchaser, such notes will not be reformed on the ground of mistake in the amount for which they were given, unless the mistake is established by the most satisfactory proof.—DONALDSON v. LEVINE, Va., 25 S. E. Rep. 541.

11. CONVERSION — What Constitutes.—Where the owner of goods shipped them upon a bill of lading whereby they were consigned to his own order, at the same time drawing in favor of a banking partnership, "for collection," a draft upon the person to whom the goods were intended to be delivered upon payment of the draft, and also attaching to the draft the bill of lading so indorsed as to give the partnership control of the possession of the goods, a delivery of them by this firm to the drawee of the draft, without requiring its payment, was, as against the owner, a conversion, subjecting the firm to an action of trover.—HOBBS v. CHICAGO PACKING & PROVISION CO., Ga., 25 S. E. Rep. 584.

12. CORPORATIONS — Accounting by Treasurer.—A treasurer of a corporation, who gets commissions for himself and for certain other directors on a sale by T to the corporation, by issuing stock of the corporation, worth par, to T (which is then transferred to him and said other directors), charging himself with receiving the price thereof, and then crediting himself with paying to T that much more than he did pay, must account to the corporation for the whole of such sum.—RUTLAND ELECTRIC LIGHT CO. v. BATES, Vt., 35 Atl. Rep. 480.

13. CORPORATIONS — Promoters.—One who engages with the owner of a tract of land in organizing a corporation to purchase the land, by procuring subscribers, frames the prospectus, and becomes one of the first subscribers, is a promoter of the corporation. —WOODBURY HEIGHTS LAND CO. v. LOUDENSLAGER, N. J., 35 Atl. Rep. 436.

14. CORPORATIONS — Reorganization — Liability for Debts.—A mining company, having exhausted its resources and incurred a large indebtedness in attempting to develop its mines, leased the same to a new corporation formed by the same stockholders under the laws of a different State. The new corporation paid off the debts of the old one, and prosecuted the work for some time, but finally became insolvent: Held that, as against third persons, the reorganization was a mere change of name, without affecting the ownership of the property, and that the old company, as well as the new, was chargeable with a mechanic's lien for labor and materials furnished to the latter.—HATCHER v. UNITED LEASING CO., U. S. C. C. (Colo.), 75 Fed. Rep. 868.

15. COUNTIES — Contracts for Erection of Public Buildings.—The cells of a jail are a part of the building, and under the county government act of 1893, § 25, subd. 9, giving boards of supervisors authority to contract for the erection of public buildings, contracts for such cells must be let as therein provided.—ERTLE v. LEARY, Cal., 46 Pac. Rep. 1.

16. CRIMINAL LAW — Rape — Assault.—Under V. S. § 4908, making it an offense punishable the same as rape for a person over 16 years old to carnally know a female under 14 years old, with or without her consent, a conviction for an assault with intent may be had where the indictment alleges, and the evidence shows, the female to be under 14, though it alleges that defendant committed the crime by force and against her will, and the evidence shows that he assaulted her with the intent to carnally know her with her consent. —STATE v. SULLIVAN, Vt., 35 Atl. Rep. 479.

17. CRIMINAL PRACTICE — Lascivious Cohabitation.— In an information charging the offense of lewd and lascivious abiding and cohabiting between an unmarried man and a married woman, both must be joined as defendants in the same information, unless one of the parties be unknown or since dead.—STATE v. HOOK, Kan., 46 Pac. Rep. 44.

18. CRIMINAL PRACTICE—Miscarriage—Indictment.— An indictment under R. L. § 4247, declaring guilty of an offense one who administers anything to a pregnant woman, or employs any means, to procure a miscarriage of such woman, unless the same is necessary to preserve her life, must allege that the miscarriage was not necessary to preserve her life; it is not enough to allege the means employed were not necessary to preserve her life.—STATE v. STEVENSON, Vt., 35 Atl. Rep. 470.

19. DECEIT—Fraudulent Representations—When Actionable.—Defendant who had money of the plaintiff in his hands, induced her to loan it to a third person,

who was unknown to her, by stating to her that the borrower was a man of large means, and that he owned certain lots, which were free from incumbrance, and on which defendant agreed to obtain security before paying over the money. Defendant did not take any security from the borrower, who did not in fact own the lots as stated. The borrower shortly after became insolvent, and the loan was not repaid: Held, that defendant was liable to plaintiff for the money, regardless of whether he knew of the falsity of his statements to her at the time they were made.—GOODALE v. MIDDAUGH, Colo., 46 Pac. Rep. 11.

20. DEED — Cancellation for Mistake.—Cancellation of a deed on the ground of mutual mistake as to the amount of incumbrance assumed by the purchaser will not be decreed where the purchaser, though discovering the mistake shortly after the transaction, continued to make payments on the incumbrance, and failed to seek relief against the vendor, till the rents of the property fell from $72 per month to $43 per month.—HUDSON v. WAUGH, Va., 25 S. E. Rep. 530.

21. DEED—Construction—Repugnant Descriptions.—A deed contained two complete descriptions of the property, one by metes and bounds along certain streets, and the other by giving the numbers of the lots and blocks according to a certain map therein referred to. The property actually sold and intended to be conveyed was correctly described by the numbers given, but was not that described by the boundaries, which was on another street, and was not owned by the grantor: Held, that the false description should be rejected, and that the deed constituted a good conveyance of the property intended.—STATE SAV. BANK v. STEWART, Va., 25 S. E. Rep. 543.

22. DEED — Conveyance by Feme Covert.—Where conveyances to a married woman, and by her, do not show that she is covert, but her deed and acknowledgment are such as prescribed for a *feme sole*, a purchaser from her vendee, without knowledge of her coverture, will be protected as an innocent purchaser. —DANIEL v. MASON, Tex., 36 S. W. Rep. 1113.

23. DEED—Lease—Construction.—Where H conveyed land to P: "To convey the same to my wife, for her use from my decease so long as she remains my widow." And P made the conveyance, and thereafter H leased the premises to B for a nominal sum to hold for the term of the life of "my wife." And on the same day B assigned the lease to her, an instruction that she took no estate in the premises under the lease and assignment might be found to be parts of one transaction, in which her husband released to her, through B, as a mere conduit, the condition against remarriage contained in the deed.—HAMMOND v. ABBOTT, Mass., 44 N. E. Rep. 620.

24. DIVORCE — Alimony — Enforcement in Another State.—A decree in a divorce judgment for payment of a specific sum absolutely as alimony, having the effect in the State where rendered of a judgment at law for payment of money, may be enforced by action at law in another State.—KUNZE v. KUNZE, Wis., 68 N. W. Rep. 391.

25. DOWER — Insane Wife — Proceeding to Release Dower.—The wife must be made a party to a proceeding under Code, § 2625, providing, if a husband of an insane wife wish to sell real estate, and have her right of dower released, he may petition the court, and if it appears to it to be proper, an order may be made for execution of such release, but the court shall make such order as in its opinion may be proper to secure to her the same interest in the purchase money and the income thereof that she would have had in the real estate and income thereof, if it had not been sold. —HESS v. GALE, Va., 25 S. E. Rep. 533.

26. EJECTMENT—Evidence of Title.—The bare statement of a witness that title to realty "passed" from one person into another is wholly incompetent to show title in the latter. A deed from one who is apparently a stranger to the paramount title, and who is not shown to have ever been in possession of the premises conveyed is insufficient to make out a *prima facie* case showing title in the grantee claiming thereunder.—BLECKLEY v. WHITE, Ga., 25 S. E. Rep. 592.

27. EVIDENCE — Conduct of Defendant Inconsistent with Defense.—Where a defendant pleads payment as a defense, evidence is admissible to show conduct on his part, since the alleged payment, inconsistent with the defense made.—WHEELER v. THOMAS, Conn., 35 Atl. Rep. 499.

28. GARNISHMENT — Appointment of Receiver. — It is competent for the plaintiff, in a garnishment proceeding based upon a pending suit, to file, in connection with and in aid of the same, an appropriate equitable petition for the purpose of subjecting to the payment of his claim against his debtor any surplus which may be left of the proceeds of personal property previously pledged by the debtor to another creditor, after the debt due to the latter has been satisfied.—KIMBROUGH v. ORR SHOE CO., Ga., 25 S. E. Rep. 576.

29. GARNISHMENT — When Lies. — One who, as authorized agent of the assignee of two mortgages, has, under a power therein, taken possession of the mortgaged chattels, to sell, and apply the proceeds in satisfaction of the debt, and return the surplus, if any, to the mortgagor, but who, immediately on being garnished by a judgment creditor of the mortgagor, voluntarily surrenders the property to the assignee of the mortgages, is not liable as garnishee, though one of the mortgages was executed with intent to defraud the mortgagor's creditors, and the other was valid only for a sum less than the amount for which the chattels were subsequently sold by such assignee, notwithstanding Sanb. & B. Ann. St. § 2768, providing that, from the time of the service of the summons, the garnishee "stands liable to the plaintiff in the amount of the property, moneys, credits and effects in his possession, or under his control, belonging to the defendant," and that such property, moneys, credits, and effects embrace those "held by a conveyance of title void as to creditors of the defendant." — GORE v. SKLUTE, Wis., 68 N. W. Rep. 396.

30. HABEAS CORPUS — Court Records — Collateral Attack.—The verity of the records of a criminal court, showing the return of an indictment, cannot be collaterally questioned, or the record varied by parol evidence, in a *habeas corpus* proceeding in another court. —WHITTEN v. SPIEGEL, Conn., 35 Atl. Rep. 508.

31. HUSBAND AND WIFE—Fraudulent Conveyances.—Where a wife loaned money to her husband for use in his business as a merchant, and he subsequently sold and conveyed to her all his merchandise in payment of the debt thus created, she in good faith accepting the conveyance in payment of, and for purpose of collecting, the debt, there was no fraud in the transaction; it appearing that the goods sold to the wife were not worth more than the amount of the loan, and it not appearing that she, by her conduct or otherwise, had in any manner misled others, or induced them to extend credit to the husband.—SIMMS v. TIDWELL, Ga., 25 S. E. Rep. 555.

32. INJUNCTION — Sale under Trust Deed. — A court will not enjoin the conveyance by a trustee of lots sold by him under a trust deed on the ground of the inadequacy of the price bid and because the lots were offered together in bulk, where no fraud is shown, and it does not appear that the sale was not open and fair, and made in accordance with the terms of the trust deed, nor that any one else would have bid more had the lots been offered separately.—OLD DOMINION INV. CO. v. MOOMAW, Va., 25 S. E. Rep. 540.

33. INSURANCE—Condition as to Title.—It being stipulated in a policy of fire insurance issued to a woman, covering a building described in the policy as "her one-story frame, shingle-roof dwelling," that the policy should be void "if the interest of the insured in the property be not truly stated therein," or "if the interest of the insured be other than unconditional and sole ownership," it was error, upon the trial of an action brought upon the policy by the insured, to reject

a plea, offered in due time, alleging that when the policy was issued the plaintiff was not the owner of the property, because she had previously conveyed the same to another by a fee-simple deed, and that if the defendant had known this fact it would not have issued the policy.—ORIENT INS. CO. v. WILLIAMSON, Ga., 25 S. E. Rep. 560.

34. INSURANCE—Subrogation Clause.—When a loss of insured property occurs according to the terms of the policy, and the insurance policy has attached to it a subrogation contract which stipulates that the loss, if any, is payable to a mortgagee, or his assigns, as his interest may appear, the owner of the mortgage is the insured, to the extent of his interest, and a change of title which increases his interest in the insured property, even to absolute ownership, will not release the insurance company from its liability to pay the loss.—DODGE v. HAMBURG BREMEN FIRE INS. CO., Kan., 46 Pac. Rep. 25.

35. FIRE INSURANCE — Subrogation to Mortgagee's Right.—The claims of a fire insurance company, which paid insurance to a mortgagee, to a part of the proceeds of the mortgage sale, through subrogation to the rights of the mortgagee, are assignable.—HARE v. HEADLEY, N. J., 35 Atl. Rep. 445.

36. INTOXICATING LIQUORS — Sale — Civil Damages.—For a saloon keeper to sell liquors to an habitual drunkard after being served with notice by the drunkard's wife not to, in violation of Act March 16, 1889, declaring it a misdemeanor so to do, is negligence, rendering the saloon keeper liable for damages suffered by the wife in consequence thereof.—RIDEN v. GREMM, Tenn., 36 S. W. Rep. 1066.

37. INTOXICATING LIQUORS—Sunday Laws.—An ordinance making it a misdemeanor to sell, deal out, or give away malt, vinous, or other liquors on Sunday, or to keep open on Sunday any place where liquors are sold, is violated by a proprietor of a saloon who invites others to his saloon on Sunday, unlocks the door, and admits them, and gives them beer, which which they drink therein.—JOHNSON v. MAYOR, ETC., OF CITY OF CHATTANOOGA, Tenn., 36 S. W. Rep. 1092.

38. JUDGMENT — Collateral Attack—Insolvency.—An order of a probate court in Ohio, in a proceeding over which it had fully acquired jurisdiction, finding that all the creditors of an insolvent had assented to the raising of the assignment, cannot be collaterally impeached.—STATE NAT. BANK OF MAYSVILLE v. ELLISON, U. S. C. C. (Ohio), 75 Fed. Rep. 354.

39. LANDLORD AND TENANT — Parol Lease.—Where parties orally agree that a lease shall be for three years, with the privilege of five, reserving a monthly rent, and, after entry by the lessee, fail to execute a written lease, the tenancy is not from month to month, within Gen. St. § 2967 (which provides that a tenancy shall be such where the lease is by parol, a monthly rent reserved, and time of termination not agreed on), but is a tenancy at will. — CORBETT v. COCHRANE, Conn., 35 Atl. Rep. 509.

40. LIBEL — Presumption of Malice. — Untrue statements of facts which upon their face are calculated to injure and defame the character of an individual being libelous *per se*, the law presumes malice from their publication. — MATTSON v. ALBERT, Tenn., 36 S. W. Rep. 1090.

41. LIMITATION OF ACTIONS—Suspension of Statute.—The commencement of an action in a court not having jurisdiction to try it does not suspend the running of the statute of limitations under the provision of Mill. & V. Code, § 3449, that if an action is commenced within the time limited, but judgment is rendered against the plaintiff on any grounds not concluding his right of action, he may bring a new action within a year thereafter.—SWEET v. CHATTANOOGA ELECTRIC LIGHT CO., Tenn., 36 S. W. Rep. 1090.

42. MANDAMUS—Practice.—When a plaintiff has shown himself entitled to a *mandamus* to compel the levy and collection of taxes by a county to pay a judgment against it, he is entitled to one which will set in motion all the necessary machinery, including the action of an assessor and collector, required to be taken after the levy of the tax by the county court, although no demand has been made on such officers to perform the acts so required.—MARION COUNTY v. COLER, U. S. C. C. of App., 75 Fed. Rep. 352.

43. MASTER AND SERVANT — Fellow-servants—Negligence.—The engineer and fireman of a shifting train are fellow-servants of the conductor, who, while attempting to act as brakeman, is injured by their negligence.—ECKLES' ADMX. v. NORFOLK & W. R. CO., Va., 25 S. E. Rep. 545.

44. MECHANIC'S LIEN—Property of Married Woman.—Under St. Ky. § 2479 (referring to the mechanic's lien law), which provides that "the provisions of the preceding sections shall apply to and be enforced against a married woman and property owned by her, if the service or labor was performed, or the materials furnished under a written contract signed by her," she cannot be charged, without a written contract, by the fact that she acquiesced in the erection of a building on her property, and gave directions about its construction.—WEBSTER v. TATTERSHALL, Ky., 36 S. W. Rep. 1126.

45. MECHANIC'S LIEN—Reputed Owner of Premises.—Though one states, in his claim of lien, that a certain person is owner and reputed owner of the premises, his lien is not impaired by proof that such person was the reputed owner only.—KELLY v. LEMBERGER, Cal., 46 Pac. Rep. 8.

46. MORTGAGE—Limitation — Merger.—A trust deed creating an express and not an implied lien, an action to foreclose it may be maintained, though an action for personal judgment on the notes thereby secured is barred by limitation.—IRVINE v. SHRUM, Tenn., 36 S. W. Rep. 1089.

47. MORTGAGES—Limitations.—An action to recover a penalty for failing to discharge of record a mortgage which had been fully paid and satisfied cannot be maintained until a demand for such discharge has been made, and it can only be brought within one year after the cause of action accrues; but, where no demand is made until more than one year after a demand should have been made, the action to recover the penalty is barred by the statute of limitations.—TRAVELERS' INS. CO. v. STUCKI, Kan., 46 Pac. Rep. 42.

48. MUNICIPAL CORPORATIONS—Health Regulations.—Sp. Acts 1895, p. 532, § 41, authorizing the city of Bridgeport to make ordinances to license "petty grocers, hucksters and common victualers," and for all other subjects that shall be deemed necessary for the preservation of the health of the citizens, does not authorize the city to require regular milkmen to be licensed.—STATE v. SMITH, Conn., 35 Atl. Rep. 506.

49. MUNICIPAL CORPORATION—Issue of Bonds.—Const. § 147, requiring elections to be by secret official ballot, declares that the word "election" shall include the decisions of questions submitted to the voters, as well as the choice of officers by them. Section 148 provides that not more than one election in each year shall be held in any town, county, etc., except as otherwise provided in the constitution, and that all elections of State and municipal officers shall be held on the first Tuesday after the first Monday in November: Held, that the question of issuing municipal bonds in excess of the yearly revenue must be submitted to the voters at the general election in November, there being no special provision to the contrary.—BELKNAP v. CITY OF LOUISVILLE, Ky., 36 S. W. Rep. 1118.

50. NEGLIGENCE—Proximate Cause.—A shipper, having put cattle for shipment in a stock pen provided by the carrier for the purpose, was fixing the gate thereof (which the carrier had negligently permitted to remain out of repair), to prevent escape of the cattle, when they, being frightened by a passing train, broke through the gate, which they could not have done but for its defective condition, injuring themselves and

him: Held, that the negligence in permitting the gate to remain out of repair was the proximate cause of the injuries.—TEXAS & P. RY. CO. v. BIGHAM, Tex., 36 S. W. Rep. 1111.

51. NEGOTIABLE INSTRUMENT—Accommodation Note—Pledge.—Where a note indorsed by the payee for accommodation of the maker is pledged by the maker, without consent of the indorser, as collateral to his own note for the same amount, given at the same time, and payable at the same time, a renewal of the principal note without the consent of the indorser of the collateral note releases him from liability.—STATE SAV. BANK v. BAKER, Va., 25 S. E. Rep. 550.

52. NEGOTIABLE INSTRUMENT — Notes — Bona Fide Holder.—H, a mining expert, had for several years bought furnaces of plaintiffs, and sold them to others in connection with an apparatus of his for smelting ores. Plaintiffs did not give him credit, but required either cash or took the note of one buying from H directly to themselves: Held, that defendant's note so taken by plaintiffs, on such a purchase being made by defendant of H, was not taken in payment of a pre-existing debt of H to plaintiffs.—BLUE SPRINGS MIN. CO. v. MCILVEIN, Tenn., 36 S. W. Rep. 1094.

53. NEGOTIABLE INSTRUMENT—Note—Usurious Agreement for Extension.—An agreement between the payee and principal on a note for its extension on payment of usurious interest is without legal consideration, is not enforceable, and, does not release sureties on the note from liability. — MCKAMY v. MCNABB, Tenn., 36 S. W. Rep. 1091.

54. INSURANCE.—Sewage discharged into a stream, though sterilized and rendered colorless and apparently inoxious of itself, may become a nuisance, and its further discharge into the stream may be enjoined, when, by reason of its combination with other substances in the stream, it become noxious and pollutes the waters, though the other substances were wrongfully deposited in the stream by others than the defendant.—MORGAN v. CITY OF DANBURY, Conn., 35 Atl. Rep. 499.

55. PARTNERSHIP—Joint Stock Company—Attempt to Incorporate.—Members of a joint stock company procured the passage by the legislature of an act incorporating a company with themselves as incorporators, and under a name similar to that of the joint stock company, with the intention of changing it into a corporation. The stockholders voted to accept the act, but no stock was issued by the corporation, no property was transferred to it, nor was any meeting ever held for the election of officers, but the company continued to do business as before: Held, that the joint stock company did not become a corporation.—WILLIS v. CHAPMAN, Vt., 35 Atl. Rep. 450.

56. PLEADING—Fraud — Usury. — Where fraud is charged in a bill as a ground for an injunction, the facts relied on to constitute the fraud must be stated. —DICKERSON v. BANKERS' LOAN & INVESTMENT CO., Va., 25 S. E. Rep. 548.

57. RAILROAD COMPANIES — Assault by Servant.—If one who had purchased a railroad ticket, intending to take a train about to arrive, but who failed to do so because he did not succeed in getting his baggage checked in time to be placed on that train, left the premises of the railroad company, and registered at an hotel, intending to take a train to his destination the next morning, and afterwards, on the day he purchased the ticket, returned to the station to make inquiries about, or arrange for the storage or checking of, his baggage, he was not at that time a "passenger," but nevertheless had the right to go to the station for the purpose stated, and, if he conducted himself properly was entitled to respectful treatment from, and immunity from an unlawful assault by, the agent while engaged in transacting with him the business mentioned; and such an assault would, under such circumstances, give a right of action against the company.—GEORGIA RAILROAD & BANKING CO. v. RICHMOND, Ga., 25 S. E. Rep. 565.

58. RAILROAD COMPANY — Injury to Trespasser.—Plaintiff, being a trespasser on the right of way of defendant's railroad at a point where there was no public crossing, while under the influence of liquor, sat down on the end of a cross-tie beside the track, and fell aleep, and, while so sitting, was struck by a passing train, and injured. No negligence was shown on the part of those in charge of the train after the plaintiff was discovered: Held that, in an action to recover damages for the injury, a verdict for defendant was properly directed.—EMBRY v. LOUISVILLE & N. R. CO., Ky., 36 S. W. Rep. 1123.

59. RECEIVERS—Appointment.—The appointment of a receiver rests in the sound discretion of the court, and such an appointment will not be disturbed on appeal, when made on a bill by a creditor charging that the defendant debtors had conveyed their property including a large mercantile establishment, on a trust for the purpose of defrauding their creditors, as was known to the trustee, which allegations were not denied by either the debtors or the trustee.—LYLE v. COMMERCIAL NAT. BANK, Va., 25 S. E. Rep. 547.

60. SALE — Conditional Sale — Title.—Where goods were sold for cash, to be paid for on delivery, the prepayment of the price being a condition precedent of the sale, the mere fact that the buyer obtained possession did not operate to pass the title to him; and, notwithstanding such possession, the title remained in the seller, the purchase money not having been paid. —BERGAN v. MAGNUS, Ga., 25 S. E. Rep. 570.

61. SEAL.—The requirement of Rev. St. § 182, that a commissioner of deeds for Wisconsin in another State shall have a seal of office, by which his official acts shall be authenticated, is not complied with by the use of a seal which does not contain the name of the State, but in which the space for such name is left blank, and in the impression the word "Wisconsin" is written in such space with a pen.—OELBERMAN v. IDE, Wis., 49 N. W. Rep. 393.

62. SPECIFIC PERFORMANCE — Laches.—The specific performance of a contract for the sale of land is not a matter of right in either party, but the right to such performance rests in the sound, reasonable discretion of a court of equity.—ASIA v. HISER, Fla., 20 South. Rep. 796.

63. TRUSTS — Establishment by Parol.—In the absence of proper pleadings and parties, parol evidence is inadmissible to ingraft a trust upon an absolute and unconditional deed.—JARRETT v. WALLACE, Ga., 25 S. E. Rep. 577.

64. VENDOR AND PURCHASER—False Representations. —A statement by a vendor of lots to a purchaser, that pipes would be laid to the property connecting with a system of water-works, is not a representation of a fact which will authorize a rescission of the sale on the ground of false representations.—MOORE v. BARRDALE, Va., 25 S. E. Rep. 529.

65. WATER AND WATER COURSES—Appropriation for Irrigation.—The right of one who has appropriated water for the purpose of irrigating his land is not interfered with by a subsequent appropriation by another for mining purposes, at a point further up the stream, unless such use impairs the value of the water to the prior appropriator for the particular purpose of his appropriation, namely, that of irrigation.—MONTANA CO. v. GEHRING, U. S. C. C. of App., 75 Fed. Rep. 384.

66. WATER AND WATER COURSES—Appropriation and Abandonment.—Abandonment by the appropriator of a water course or ditch, where the non-user has existed less than five years, occurs under the California statute (Civ. Code, §§ 1410, 1411), only when there is a concurrence of act and intent. Yielding up of possession and non-user are evidence of abandonment, but this evidence may be rebutted by showing that there was no intention to abandon. — INTEGRAL QUICKSILVER MIN. CO. v. ALTOONA QUICKSILVER MIN. CO., U. S. C. of App., 75 Fed. Rep. 379.